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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS SANCHEZ, Defendant and Appellant.	B206122 (Los Angeles County Super. Ct. No. VA099898)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juan Carlos Sanchez was convicted, following a jury trial, of eight counts of committing a lewd act on a child under the age of 14 years in violation of Penal Code[1] section 288, subdivision (a), one count of sexual intercourse or sodomy with a child under 10 in violation of section 288.7, subdivision (a) and one count of oral copulation or sexual penetration with a child under 10 in violation of section 288.7, subdivision (b). The jury found true the allegations that appellant committed lewd acts against more than one victim within the meaning of section 1203.066, subdivision (a)(7), engaged in substantial sexual conduct during three of the lewd acts within the meaning of section 1203.066, subdivision (a)(8) and perpetrated the lewd acts against more than one victim within the meaning of section 667.61, subdivisions (b), (c)(5) through (8) and (e)(5). The trial court sentenced appellant to six consecutive terms of 15 years to life for the counts 1, 2, 3, 6, 7, and 8 lewd acts convictions, 25 years to life for the section 288.7, subdivision (a) conviction and 15 years to life for the section 288.7, subdivision (b) conviction, for a total of 130 years to life in state prison.[2]

Appellant appeals from the judgment of conviction, contending that the trial court erred in failing to suppress his confession, instructing the jury with CALJIC No. 2.20.1 and sentencing him consecutively for his offenses. Appellant requests that we independently review the trial court's in camera *Pitchess* motion. We affirm the judgment of conviction.

Facts

Appellant lived with Silvia P. and P.'s eight-year-old granddaughter N. in P.'s apartment. N.'s friend eight-year-old S. spent the weekend with N. at P.'s apartment on occasion.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The court stayed sentence on counts 4 and 5 pursuant to section 654.

Beginning in about 2003 or 2004, appellant touched N. in a sexual manner. Around Christmas, 2006, appellant began touching N. more frequently on her breasts and vagina. Thereafter, he touched N.'s vagina with his lips and tongue about 30 times, put his penis in her vagina about 20 times and put his finger in her vagina about 10 times. Appellant also rubbed his penis against N.'s leg, ejaculated on her stomach and orally copulated her multiple times.

Also beginning around Christmas, 2006, when S. was sleeping overnight at P. 's apartment, appellant touched her breasts on two occasions and her vagina on three to five occasions.

N. did not tell anyone about appellant's activities because she was afraid that he would do something to her grandmother. When N. went to live with her father and stepmother, she told her stepmother about appellant's activities. The police were called immediately.

Appellant made a statement to police on March 5, 2007 and admitted committing many of the acts described by N. and S. He claimed N. and S. wanted him to show them how to have sex, and that they enjoyed it and sought him out for sexual pleasure.

N. was examined for sexual abuse on March 7, 2007. No physical trauma was found, but this was not inconsistent with sexual trauma in a girl of N.'s age.

S. underwent a sexual abuse examination on March 15, 2007. No physical trauma was found, but this was consistent with the nature of appellant's sexual activities.

Discussion

1. Voluntariness of confession

Appellant contends that the arresting officers made implied threats which rendered his confession to Detective Fernandez the next day involuntary, and that the trial court erred in denying his motion to exclude that confession. We do not agree.

In order for a defendant's confession to be admissible at trial, the prosecution must show by a preponderance of the evidence that the confession was made voluntarily. (*People* v. *Boyette* (2002) 29 Cal.4th 381, 411.)

On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. (*People* v. *Boyette*, *supra*, 29 Cal.4th at p. 411.)

The voluntariness of a confession is determined by the totality of the circumstances, including the characteristics of the accused and the details of the interrogation. (*People* v. *Hill* (1992) 3 Cal.4th 959, 981, overruled on other grounds by *Price* v. *Superior Court* (2001) 25 Cal.4th 1046.) No single factor is dispositive in determining voluntariness. (*People* v. *Williams* (1997) 16 Cal.4th 635, 661.)

At the hearing on his motion, appellant testified that the officers who came to his house questioned him in his bedroom before arresting him. During that time, one of the officers displayed his taser, pointed it at the window, television and floor in a threatening manner and asked appellant if he knew what the weapon was for. When appellant replied that he did not, the officer said, "This is for you to tell the truth." The officer then put the taser back in his holster, took out his baton and hit it against his own leg while urging appellant to tell the truth. The questioning took 15 minutes. Appellant denied making any incriminating statements to the officers. The officers arrested appellant and took him to the police station. He did not see them again.

Appellant testified that the memories of those intimidating, threatening gestures pressured him to confess the next afternoon to Detective Fernandez. He claimed that he also confessed because, on the walk from his jail cell to the interview room, Detective Fernandez promised appellant that he would get out very quickly if he confessed.

Officer Melendrez, one of the arresting officers, testified at the hearing. Officer Melendrez did not remember all of the details of the encounter with appellant. He did not remember if he took out his taser or baton. He also did not remember if his partner took out his taser, but did remember that his partner never took out his baton. Officer Melendrez denied that he or his partner had ever threatened appellant. Officer Melendrez testified that he and his partner urged appellant to tell the truth, and that appellant

admitted that he had touched both girls. The officers immediately arrested appellant, took him to the station, and booked him. They did not see him again.

Detective Fernandez's interview of appellant was taped. Detective Fernandez also testified at the hearing. He denied making any threats, promises, or offers of help to appellant.

Appellant contends that Officer Melendrez's testimony corroborated his testimony because Melendrez testified that he could not remember whether he or his partner had taken out their weapons. He characterizes this as "a non-denial in the face of a shocking accusation." He concludes that the evidence shows threatened physical coercion which overbore his will.

We do not agree. Officer Melendrez specifically denied the officers made any threats to appellant, including threats of physical harm. This denial can only be understood as a denial that one of the officers pointed a taser and told appellant that the purpose of a taser was to make him tell the truth or hit his own leg with a baton while telling appellant to tell the truth. Thus, Officer Melendrez's testimony does not corroborate appellant's testimony.

The issue of whether appellant was threatened was thus a credibility dispute for the trial court. The trial court did not make specific findings of fact on credibility, but its denial of appellant's motion contains an implied finding that appellant was not credible. We see substantial evidence to support the trial court's implied finding. We would reach the same conclusion if we reviewed the evidence independently.

2. Review of *Pitchess* motion

Appellant requests that this Court conduct an independent review of the in camera proceedings done by the trial court in response to appellant's *Pitchess* motion for discovery of peace officer personnel records.

When requested to do so by an appellant, an appellate court can and should independently review the transcript of the trial court's in camera *Pitchess* hearing to

determine whether the trial court disclosed all relevant complaints. (*People* v. *Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the transcript of the in camera proceedings and see no error in the trial court's rulings concerning disclosure.

3. CALJIC No. 2.20.1

The trial court instructed the jury with the standard version of CALJIC No. 2.20.1, which provides: "In evaluating the testimony of a child ten years of age or younger you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. *A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult.* You should not discount or distrust the testimony of a child solely because she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge." (Italics added.)

Appellant contends that the second sentence of the instruction, italicized above, invaded the jury's fact-finding province and unfairly bolstered the victims' level of credibility, and thereby violated his constitutional right to a jury trial and due process. He also contends that it unfairly limited his ability to impeach the victims and so violated his constitutional rights to present a defense and confront the witnesses against him.[3] We do not agree.

Section 1127f mandates the wording of the CALJIC No. 2.20.1, including the second sentence, italicized above. The Courts of Appeal have repeatedly rejected

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[3] Respondent contends that appellant has waived this claim by failing to object in the trial court. A claim that an instruction is legally incorrect and violates due process, or other substantial rights need not be preserved by objection. (*People* v. *Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) As the Court in *Smithey* pointed out, section 1259 provides that an appellate court may review any instruction given "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (*Ibid*.)

constitutional challenges to that section which were identical to the ones raised by appellant in this proceeding. (*People* v. *McCoy* (2005) 133 Cal.App.4th 974, 979-980; *People* v. *Jones* (1992) 10 Cal.App.4th 1566, 1572, 1574; *People* v. *Gilbert* (1992) 5 Cal.App.4th 1372, 1393-1394; *People* v. *Harlan* (1990) 222 Cal.App.3d 439, 455-457; see *People* v. *Dennis* (1998) 17 Cal.4th 468, 527 [noting the foregoing cases decided before 1998].) We agree with the reasoning of these well-established cases. CALJIC No. 2.20.1 simply gives the jury factors to consider in evaluating the credibility of child witnesses. This in no way invades the province of the jury or restricts appellant's ability to present a defense or cross-examine witnesses. It does not deny appellant due process of law.

4. Consecutive sentences

Appellant contends that the trial court erroneously believed that it was required to impose consecutive sentences for the section 288, subdivision (a) convictions. Respondent contends that appellant has forfeited this claim by failing to raise it in the trial court. Appellant contends that if the claim is forfeited, he received ineffective assistance of counsel.

We agree that appellant has forfeited the claim. (See *People* v. *Scott* (1994) 9 Cal.4th 331, 348-356.) The trial court had discretion to impose consecutive sentences, so the sentence is authorized. Accordingly, we consider appellant's claim that his counsel was ineffective for asserting in his sentencing memorandum that consecutive sentences were required.

Appellant has the burden of proving ineffective assistance of counsel. (*People* v. *Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-688, 694; *People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 694.)

When an appellant makes an ineffective assistance claim on appeal, we look to see if the record contains any explanation for the challenged aspects of the representation. If the record is silent, then the contention must be rejected "'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation [citation].'" (*People* v. *Haskett* (1990) 52 Cal.3d 210, 248.)

Consecutive sentences are not mandatory under the One Strike Law for section 288, subdivision (a) convictions. (§ 667.61, subds. (c)(1)-(7), (i).) There can be no satisfactory explanation for counsel's argument to the contrary. Thus, counsel's performance fell below an objective standard of reasonableness.

We see no reasonable probability that appellant would have received a more favorable outcome in the absence of counsel's error however. The trial court was not required to sentence appellant consecutively for the section 288.7 convictions, but choose to do so. This demonstrates that the trial court believed that appellant should receive the maximum sentence possible. There are ample reasons which support such sentencing. The victims in this case were young and highly vulnerable. Appellant occupied a position of trust with respect to the victims. Although appellant confessed to sexually touching the victims, he did not take responsibility for his actions, but rather blamed the victims.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring and Dissenting

There is no way to know what the trial court would have done if it knew it had discretion to impose concurrent sentences. The error is therefore not harmless. I would reverse and remand in order to have the trial court exercise its discretion in that regard. I otherwise concur in the remainder of the majority opinion.

MOSK, J.